

P.E.R.C. NO. 2010-37

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NORTH BERGEN,

Respondent,

-and-

Docket No. RO-2009-071

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 701,

Petitioner.

SYNOPSIS

In a case of first impression, the Public Employment Relations Commission grants the International Brotherhood of Teamsters, Local 701's request for review of the Director of Representation's decision declining to certify it as the majority representative of the non-supervisory EMTs employed by the Township of North Bergen based on authorization cards. The Director declined to certify Local 701 and directed an election instead because ten employees rescinded their authorization cards. Local 701 argues that the Commission has never considered the effect of revoking authorization cards and the Director erred when he declined to certify the unit. The Township opposes review. The Commission holds that it will permit employees to revoke authorization cards prior to certification and that the Director's ordering of an election was a reasonable exercise of his discretion. Allegations of employer misconduct will be litigated in a related unfair practice case.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Weiner Lesniak, attorneys  
(Mark A. Tabakin, of counsel)

For the Petitioner, Mets, Schiro & McGovern, LLP,  
attorneys (James M. Mets, of counsel)

DECISION

The International Brotherhood of Teamsters, Local 701 has requested review of a decision of the Director of Representation declining to certify it as the majority representative of the non-supervisory Emergency Medical Technicians ("EMTs") employed by the Township of North Bergen based on authorization cards it submitted and directing an election instead. Because this case presents a matter of first impression, we grant the request for review. We affirm the Director's decision.

N.J.S.A. 34:13A-5.3 permits an employee organization to gain Commission certification as a majority representative if a majority of employees in an appropriate negotiations unit sign

authorization cards indicating their preference for that representative, if the cards are printed in a language understood by the signers, and if no other organization is seeking to be the majority representative. On February 5, 2009, Local 701 filed a representation petition seeking certification as the majority representative of the Township's full-time and part-time EMTs, excluding supervisors, based on the authorization cards it submitted. Each card stated that the signer authorized "Local 701, affiliated with the International Brotherhood of Teamsters to represent me in negotiations for better wages, hours, and working conditions."

The Township objected to a certification by card check. It requested that a secret ballot election be conducted to determine the employees' intent.

Pursuant to N.J.A.C. 19:11-2.2, the Director of Representation conducted an administrative investigation. During that investigation, the parties agreed on the appropriateness of a negotiations unit of non-supervisory EMTs and resolved most of their disagreements over employee eligibility for inclusion in this unit.

Pursuant to N.J.A.C. 19:11-2.4, the Director directed the Township to post a notice to all employees stating that Local 701 was seeking certification as the majority representative of non-supervisory EMTs without an election based on its claim that a

majority of employees had signed authorization cards and no other employee organization was seeking to represent that negotiations unit.

Ten employees then wrote the Township seeking to rescind their authorizations of Local 701 to represent them. Copies of the letters were also sent to Local 701 and to the Director of Representation. The letters all stated:

I was wrongly informed and promised a full-time position as well as benefits and a pension by the organizer. I was told that we will meet and discuss the pros and cons before any further action would be taken. I was pressured into [signing the authorization card] and told that we will be able to cast a vote. None of these actions were taken by the organizer and therefore, I wish to revoke my authorization card.

A cover letter accompanying the ten letters stated:

We were falsely misled and harassed by the organizer into signing an authorization card. We were told that we were signing the cards to have a union rep come and speak to us. We were never told that these cards will count as our vote. The organizer also told us that if we signed the cards we were guaranteed a full-time position with benefits and a pension. We were also told that if we disagree with anything that the union rep had to offer we will be able to withdraw from it.

According to Local 701, three employees sought to rescind authorizations even though they had not signed cards.

On June 4, 2009, the Director advised the parties by letter that he was not inclined to certify Local 701 as the majority representative because of doubts about the validity of the ten

authorization cards and that he was inclined to order an election instead. He gave the parties an opportunity to reply to his letter.

On June 22, 2009, Local 701 filed a letter objecting to an election and requesting that the Director either certify it as the majority representative based upon all the authorization cards it submitted or order a hearing to determine the validity of the cards in dispute. It also submitted two affidavits.

One affidavit was from Steven Job, a part-time EMT who collected authorization cards on Local 701's behalf. Job asserts that he explained to employees that the cards were for a card check, not an election, and that he did not threaten, harass, or coerce any employee or promise any employee that he or she would obtain a full-time position with benefits and a pension or tell any employee that cards could be withdrawn once signed. Job also asserts that after disseminating the cards, he became aware that Captain Dave Prina, a supervisor, was questioning the employees about the cards and that, "upon information and belief," Rich Consuelo, the Commissioner of North Bergen EMS, was adamantly against Local 701's organizational effort. Job also asserts that he "was aware that supervisory personnel had told several employees that if the EMTs unionized, every employee would be fired and the Township would hire a third-party contractor to provide ambulance service"; no employees asked him to return

their cards to them or told him they were withdrawing their cards; he "was informed that employees were told that they could download pre-typed letters asking to withdraw their authorization cards from management"; "[i]ndividuals who did not sign authorization cards or who were subsequently asked to withdraw their authorization cards were given better shifts and more hours"; and "[i]n the past, employees have supported organizational efforts, however, the Township has engaged in anti-union campaigning."

The other affidavit was from Anna Gruber, a part-time EMT who signed an authorization card given her by Job. Gruber asserts that she knew that her signature authorized Local 701 to act as her bargaining representative and an election would be unnecessary if Local 701 collected enough cards; and that Job did not harass, mislead, coerce, or pressure her or tell her that by signing the card she was simply authorizing a union representative to speak to her or promise her a full-time position, benefits, and pension. Gruber also asserts that after the notice of Local 701's petition was posted, "it became apparent that the Township's management was against the Union"; to "her knowledge and belief" Consuelo opposed unionization; she was asked by a Township employee working in EMS headquarters if she was for or against Local 701 because that employee was compiling a list of employees who were against Local 701 or who

wished to withdraw authorization cards;<sup>1/</sup> she refused to answer that question, but feared that the Township might retaliate against employees whose names did not appear on that list; after she became aware of the list, employees began to request that their names be withdrawn; she "was informed that if the Union was authorized to represent North Bergen EMTs, the Township may decide to fire all its employees and hire an outside company to perform emergency medical services; and "individuals who refused to sign authorization cards or who asked to have their authorization cards withdrawn have been given preferred shifts and work more hours than those employees who support the Union."

On July 14, 2009, the Director issued a decision denying Local 701's requests for certification based upon the authorization cards it submitted or, in the alternative, for a hearing to determine the validity of the disputed cards. D.R. No. 2010-3, 35 NJPER 244 (¶88 2009). He directed an election, finding that the ten letters revoking authorizations raised doubts as to whether these cards were valid for purposes of certifying Local 701 as the majority representative and reasoning that a secret ballot election was the best and fastest way to resolve doubts about employee preferences. The Director also

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<sup>1/</sup> In its brief requesting review, Local 701 asserts that this employee was Consuelo's secretary, but we cannot accept that representation since Gruber's affidavit does not name the employee.

rejected Local 701's contention that it was entitled to certification as the majority representative under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). Observing that Gissel was an unfair practice case in which a bargaining order was issued as an appropriate remedy for egregious unfair practices, the Director noted that Local 701 had not filed an unfair practice charge or adduced facts demonstrating that the Township had engaged in unlawful conduct. He found that while there were not enough valid authorization cards to establish that Local 701 was supported by a majority of employees, there were enough cards to meet the 30% showing of interest requirements under N.J.A.C. 19:11-1.2(d) and thus to warrant an election.

Local 701 has requested review of D.R. 2010-3. It asserts that the Commission has never considered the effect of revoking authorization cards in a case in which an employee organization is seeking card-check certification; substantial questions of law have been raised by the Director's alleged departure from Gissel and by his ordering an election instead of certifying Local 701 or ordering a hearing; and the Director erred on substantial factual issues in finding that Local 701 had not submitted enough valid cards to be entitled to certification.<sup>2/</sup>

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<sup>2/</sup> Simultaneously with requesting review, Local 701 filed an unfair practice charge (CO-2010-33) repeating the assertions in the Job and Gruber affidavits and asserting that the Township's efforts to pressure employees to withdraw their  
(continued...)



The Township opposes review. It asserts that the Director correctly applied agency precedent in determining that a secret ballot election was the best way to resolve doubts about the revoked authorization cards; the Director's decision did not depart from Gissel; Local 701 did not submit any competent evidence, as opposed to conjecture and hearsay, to support its claim of employer misconduct; any claim of misconduct must be litigated in an unfair practice proceeding; and granting certification to Local 701 would prejudice the rights of Township employees whose cards were obtained through undue means.<sup>3/</sup>

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2/ (...continued)  
authorization cards interfered with their rights and the formation of an employee organization; made a fair election impossible and required blocking the scheduled election; and necessitated a bargaining order pursuant to Gissel.

3/ On August 3, 2009, the Director ordered a secret ballot election, but directed that the ballots be impounded pending resolution of the unfair practice charge. On August 6, the Chairman denied Local 701's request for a stay of the election, finding no irreparable harm given that the ballots were to be impounded and that all legal issues could be resolved before the ballots were counted. Hearings on the unfair practice charge have been expedited.

N.J.A.C. 19:11-8.2 sets forth the grounds for granting a request for review in a representation case. A request for review will be granted only for one or more of these compelling reasons:

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
4. An important Commission rule or policy should be reconsidered.

We grant review because this case presents an issue of first impression under the card-check legislation enacted in 2005. We have never considered the significance of authorization card revocations and the procedures for resolving disputes concerning such revocations.

Before the card-check law, an organization filing a representation petition had to win a secret ballot election to be certified as a majority representative. To secure an election, the petitioning organization had to submit a showing of interest demonstrating that at least 30% of the employees in the petitioned-for unit wanted the organization to represent them.

N.J.A.C. 19:11-1.2(a)9. Such a showing of interest could be

based on signed authorization cards, N.J.A.C. 19:10-1.1 ("showing of interest" defined). In several cases, employers contested the adequacy of a showing of interest based on a contention that authorization cards had been improperly obtained and asserted that the agency should therefore refuse to hold an election and dismiss the representation petition. Our agency rejected these requests because showings of interest were for administrative convenience only and the best way to determine whether employees supported an organization was to hold a secret ballot election. See, e.g., State of New Jersey (DOC), D.R. No. 2006-6, 31 NJPER 389 (¶151 2005); Borough of Paramus, D.R. No. 95-11, 21 NJPER 25 (¶26015 1994); see also City of Newark and Association of Government Attorneys, 346 N.J. Super. 460, 466 (App. Div. 2002). These cases, however, did not involve the card-check law by which the New Jersey Legislature authorized an alternative to secret ballot elections as a route to certification. We now turn to that law and our regulations implementing it.

As we have said, N.J.S.A. 34:13A-5.3 permits an employee organization to be certified as the majority representative if a majority of employees in the negotiations unit sign cards authorizing that organization to represent them in collective negotiations and if certain other conditions are met. Our regulations provide for the filing of petitions seeking certification based on authorization cards, N.J.A.C. 19:11-1.2

(a)10; the posting of a notice informing employees that the organization is seeking certification without an election on the basis of its claim that a majority of unit employees have signed authorization cards, N.J.A.C. 19:11-2.4(b)(3); and an investigation of a card-check petition and a determination by the Director of Representation as to whether a majority of unit employees have signed valid authorization cards, N.J.A.C. 19:11-2.6(b). After an investigation, the Director may certify an organization as the majority representative based on its submission of valid authorization cards. N.J.A.C. 19:11-2.6(d)6. The Director is also authorized to direct an election if a valid question of representation exists and if an election will effectuate the purposes of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., or to take other measures deemed appropriate by the Director. N.J.A.C. 19:11-2.6(d)3 and 7.

The Director declined to certify Local 701 as the majority representative because it did not submit enough valid authorization cards to establish majority support given that ten employees had revoked their authorizations during the investigation of the petition. Contrast Mt. Ephraim Bd. of Ed., D.R. No. 2007-3, 32 NJPER 293 (¶121 2006) (certifying union as majority representative based on a card check absent any contact by employees objecting to certification). Local 701 does not

argue that employees are powerless to revoke authorizations after cards have been submitted in support of a card-check petition but before a certification has issued. We hold that employees may do so and that the Director may consider such revocations in determining whether, after an investigation, an employee organization is entitled to certification as a majority representative based on its submission of valid authorization cards signed by a majority of employees in the appropriate negotiations unit.

Local 701 asserts that the question here is what remedy may be afforded when an employer engages in aggressive and unlawful anti-union campaigning after the card-check but before certification. Answering that question, it argues that the United States Supreme Court opinion in Gissel required the Director to certify it as majority representative because the Township's alleged unfair practices led to the revocations undermining its majority support. We disagree with Local 701's application of Gissel in this representation proceeding. That case involved unfair practice proceedings in which it was proved that the employer had committed egregious unfair practices undercutting what had been the union's majority support as evidenced by authorization cards that had been secured by the union without any misrepresentations or coercion on its part. Further, given the employer's unfair practices, a fair election

was an unlikely possibility. Under those circumstances, the National Labor Relations Board issued a remedial order requiring the employer to bargain with the union and rejected a contention that an election was first required to determine whether a majority of employees still supported the union. Here, the affidavits submitted by Local 701 in this representation proceeding allege but do not prove that the named employer representatives committed particular unfair practices or provide a basis for counting the revoked authorization cards. Those allegations may be addressed in the unfair practice hearings now underway. If Local 701 can prove in those proceedings that the employer committed unfair practices resulting in the revocation of authorization cards and thus the loss of its support by a majority of EMTs, it can obtain as a remedy the certification order sought in this case.<sup>4/</sup>

We are also not persuaded that the Director was required to order a hearing rather than an election to resolve his doubts about the revoked authorization cards. Since the card-check law entitles employee organizations to certification when our agency

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<sup>4/</sup> Given New Jersey's card-check law, Local 701 need not prove, as a prerequisite to obtaining the remedy of certification, that a fair election would be unlikely. In the private sector, such a showing is required because an employee organization cannot normally obtain certification without winning an election. Given our card-check law, certification without an election is a logical remedy for an unfair practice causing the revocation of authorization cards needed to establish majority support.

determines that all its conditions have been satisfied, we will assume that it is not always appropriate to direct an election rather than hold a hearing when the validity of authorization cards is in doubt. But a hearing need not be held unless it appears to the Director that substantial and material factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearing. N.J.A.C. 19:11-2.6(f). It is undisputed that several employees revoked their authorization cards and that Local 701 did not have enough other cards to obtain certification absent the revoked cards. While Local 701 believes that employer agents pressured employees to revoke their authorizations, it did not provide the Director with competent evidence of particular acts by particular personnel to support that belief and thus to warrant a hearing in this representation case.

Under all the circumstances, we believe that ordering an election was a reasonable exercise of the Director's discretion to determine how a representation proceeding should best be handled after an investigation. Elections are generally consonant with the Act's purposes of safeguarding employee free choice and the election in this case did not prejudice Local 701's ability to file a timely unfair practice charge and obtain a certification order if it prevails on its allegations in the unfair practice proceedings. In that regard, we note and

appreciate that the unfair practice hearings were expeditiously scheduled beginning October 20, 2009 so that all the issues in the representation and unfair practice cases may be resolved soon.

ORDER

The request for review is granted. The direction of election in D.R. 2010-3 is affirmed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: November 24, 2009

Trenton, New Jersey